APPENDIX

DECISION AND OPINION OF THE OHIO SUPREME COURT

(Decided May 26, 1982)

No. 81-1108

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO, CITY OF COLUMBUS

WILLIAM J. McNEA, *et al.*,
Appellees,

vs.

GEORGE VOINOVICH, *et al.*,
Appellants.

APPEAL from the Court of Appeals for Cuyahoga County.

The city of Cleveland (city), on December 3, 1980, issued layoff notices to 184 workers, including 94 regularly appointed civil service appointees and 90 temporary appointees, as a budget balancing measure. Fifty-three police officers were among the group of employees to be laid off. On the same day that the layoff notices were announced, a taxpayers' action was initiated on behalf of the 53 police officers. The officers sought declaratory and injunctive relief prohibiting the city from laying them off. They alleged (1) that the city could not legally lay off classified appointees while it maintained hundreds of untested temporary employees on the payroll beyond the

90-day legal limit established by the city charter for such temporary employees,[1] and (2) that the layoffs of the 53 police officers would jeopardize the health, safety, morals, and welfare of the city, its residents, and taxpayers. The complaint was subsequently amended to include several temporary appointees as new-party defendants, representing the class of untested temporary employees who had worked for the city longer than 90 days.

The trial court granted a preliminary injunction on December 31, 1980, which was followed by a permanent injunction issued on January 15, 1981. The trial court enjoined the city from following through with the police layoffs while temporary employees who had served more than 90 days remained on the city's payroll. The court also premised its grant of injunctive relief on the factual finding that laying off the 53 police officers would jeopardize the health, safety, morals, and welfare of the city, its residents, and taxpayers.

The city [illegible] the new-party defendants appealed to the Court of Appeals. The Court of Appeals affirmed the lower court, determining that the mayor had abused his

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1. The relevant provisions of Cleveland city charter sections 130 and 135 state as follows: Section 130 provides that "[e]ligible lists created by the [Civil Service] Commission shall remain in force not longer than two years. In the absence of an appropriate eligible list, any place may be filled temporarily, without test, for the period limited by the civil service rules, but not exceeding ninety days. During such period the Commission shall hold the necessary tests for filling any such place permanently. * * *"

Section 135 provides that " * * * [t]he Treasurer shall not pay, nor shall the Commissioner of Accounts issue a voucher for the payment of, any salary or compensation to any person holding a position in the classified service unless the payroll or account of such salary or compensation shall bear the certificate of the Civil Service Commission that the persons named therein have been appointed or employed and are performing service in accordance with the civil service provisions of this Charter and the rules established thereunder, * * *"

discretion by ordering the layoffs of classified civil service workers while retaining temporary employees on the payroll for more than 90 days. The court also acquiesced in the finding of the trial court that the city's health, safety, morals, and welfare here jeopardized by the proposed police layoffs, and found that the city's belated attempt to reappoint temporary employees so as to start the 90-day period running anew was ineffective.

The cause is now before this court pursuant to the allowance of a motion to certify the record.

Fink, Greene & Hennenberg Co., L.P.A., and Mr. Murray D. Bilfield, for appellees.

Mr. Thomas E. Wagner, director of law, Mr. Mark I. Wallach and Ms. Marilyn G. Zack, for appellants city et al.

Mr. Malcolm C. Douglas, for appellant new-party defendants.

Per Curiam. This appeal presents two issues for decision. The first is whether the proposed layoffs violated the Cleveland city charter (charter), specifically Sections 130 and 135 thereof. The second is whether the proposed layoffs jeopardized the city's health, safety, morals, and welfare.

The Court of Appeals relied on *Gannon v. Perk* (1976), 47 Ohio App. 2d 125 (hereinafter *Gannon* I), to support its ruling on the charter question. The court interpreted *Gannon* I as finding that the Cleveland city charter "prohibited the City from retaining temporary employees in excess of ninety days unless they became regular appointments by competitive examination * * *." *Gannon* I, however, was appealed to this court, which reversed the Court of Appeals in part on procedural grounds in *Gannon v. Perk* (1976), 46 Ohio St. 2d 301 (*Gannon* II). In *Gannon* II

this court expressly reserved the question of "whether employment of the temporary employees * * * violated the provisions of the Charter of the city of Cleveland." *Id.* at 213, fn. 3. Nevertheless, the Court of Appeals' reliance on the substantive interpretation of the city charter in *Gannon* I is questionable in light of language used by this court in *Gannon* II. We stated the following in *Gannon* II at pages 312-313.

"In *State, ex rel. Buckman v. Munson* (1943), 141 Ohio St. 319, 326, the court concluded that public employees may be laid-off for reasons of economy 'notwithstanding statutory or charter provisions to the effect that no employee in the classified service shall be removed except for cause * * *, the view * * * being that such statutory or charter provisions * * * are not intended to restrict the public authorities in their efforts to effect necessary or desirable economies.'

"The reasoning of the court in *Munson* applies as well to the cause at bar. Lack of funds induced when projected income falls below anticipated expenses is a legitimate basis for laying off civil service employees, including safety personnel, so long as such layoffs are made in conformity with law. In the instant case, then, the issue becomes whether the layoff of policemen and firemen was made in conformity with the ordinances, charter provisions, and civil service rules of the city of Cleveland.

"The charter and ordinances of the city do not establish a mandatory priority for layoffs of municipal employees due to reasons of economy. Therefore, the power to lay off municipal employees must repose within the sound discretion of the mayor of the city, as its chief executive officer, to be exercised in accordance with law."

The principal difficulty in accepting the conclusions of the courts below is, to use appellants' (city of Cleveland *et al.*) phrase, the failure "to recognize the lack of any legal or logical nexus between the allegations relating to the status of persons holding temporary appointments in the absence of eligible lists for their classifications and the injunctive relief requested by plaintiffs." The relationship, if any, between the allegedly improperly retained temporary employees and the layoff notices issued to the 53 police officers is tenuous. (The *Gannon* I court recognized as much, stating in a journal entry clarifying its opinion that the matters of police layoffs and the status of temporary employees were "independent and unrelated issues.")

Appellees are correct in asserting that the city charter Section 130 establishes a 90-day period for untested temporary employees and that Section 135 precludes payment absent "the certificate of the Civil Service Commission that the persons named therein have been appointed * * * in accordance with the civil service provisions * * *." Appellants argue, however, that "[t]he proper remedy of taxpayers or other persons aggrieved by the Civil Service Commission's failure to timely test within 90 days is an order compelling a test. * * * [N]either the failure of the Civil Service Commission to meet that testing deadline nor the failure of an aggrieved party to seek such an order has any legal effect on the status of a temporary appointee." In other words, even if the city has not precisely complied with its own civil service regulations, such non-compliance is irrelevant in the context of the instant case. The status of the 90-day-plus untested temporary employees as employees is unchanged; they are still part of the city's civil service so long as they continue to do their jobs. What appellees herein have attempted to do, and what the courts

below acquiesced in is the bootstrapping of an alleged violation regarding temporary employees into a vested right inuring to permanent employees in times of fiscal distress.

We reject the layoff priority scheme fashioned by the courts below. Sections 130 and 135 of the city charter do not establish, directly or indirectly, layoff priorities.[2] Therefore, unless and until the city chooses to amend its charter or otherwise legislate on the matter of layoff priorities, the power to lay off municipal employees in a financial emergency "must repose within the sound discretion of the mayor * * *." *Gannon II*, *supra*.

We now turn our attention to the second issue raised in this appeal. As previously noted, the trial court found that the proposed layoffs of 53 police officers jeopardized the city's health, safety, morals, and welfare. As a matter of law, we cannot accept the trial court's conclusions regarding the effect of the proposed layoffs on the city's health, safety, morals, and welfare. The proposed layoffs contemplated removal of one experienced officer and 52 rookies who had recently completed training at the Police Academy. Appellants plausibly assert that "[f]or a municipality in virtual bankruptcy, the layoff of 53 officers * * * from a police force of 1871 does not constitute the

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2. As we noted in *Gannon II*, *supra*, at page 313, the only section of the charter that mentions layoffs is Section 127, which states in pertinent part: "The civil service commission shall make * * * rules for the * * * lay-off * * * of city officials and employees in the classified service. * * *" Civil Service Commission Rule 8.20 deals with layoff priority and establishes the following procedure:

"Whenever it becomes necessary to reduce the working force in a classification in any division of the city service, the appointing authority may lay off any appointee in such classification; provided however, that where two or more persons are employed in a classification, they shall be laid off in the inverse order of their appointment in such classification, unless otherwise first approved by the commission for good cause shown * * *."

gross abuse of discretion which would warrant the trial court's stripping the Mayor of his vested authority." We agree with appellants that the contemplated layoffs, which were predicated on the city's exigent financial circumstances, did not constitute a gross abuse of discretion. Unquestionably, the layoffs would have had an adverse effect on the police department's ability to serve the public. Nevertheless, the record does not support the conclusion that the negative impact of this relatively modest number of layoffs would have been so severe as to result in the "functional paralysis" of the police department envisaged by the trial court.

The trial court's finding on the safety issue and the Court of Appeals' summary affirmance thereof is an expedient to avoid this court's holding in *Gannon* II, at page 313, that "the Charter of the city of Cleveland does not confer upon its safety forces a preferred priority over other civil service employees in the event layoffs are necessitated by reasons of economy." The rule of *Gannon* II is susceptible of evasion if trial courts routinely find that laying off safety personnel jeopardizes a community's health, safety, morals, and welfare.

For the reasons hereinbefore stated, the judgment of the Court of Appeals is reversed.

Judgment reversed.

W. BROWN, *Acting C. J.*, KEEFE, SWEENEY LOCHER, HOLMES, C. BROWN and KRUPANSKY, *JJ.*, concur.

KEEFE, *J.*, of the First Appellate District, sitting for CELEBREZZE, *C. J.*

DECISION AND OPINION OF THE OHIO COURT OF APPEALS FOR THE EIGHTH JUDICIAL DISTRICT

(Dated May 14, 1981)

No. 43378 & 43416

COURT OF APPEALS OF OHIO
EIGHTH DISTRICT, COUNTY OF CUYAHOGA

WILLIAM J. McNEA, *et al.*,
Appellees,

vs.

GEORGE VOINOVICH, *et al.*,
Appellants,

and

JEFFREY COMFORT AND GARY J. NIED,
New Party Defendants-Appellants.

Date May 14, 1981

JOURNAL ENTRY AND OPINION

COOK, *P.J.*:

This cause came on to be heard upon the pleadings and the transcript of the evidence and the record in the Common Pleas Court, and was argued by counsel for the parties; and upon consideration, the court finds no error prejudicial to the appellant and therefore the judgment of the Common Pleas Court is affirmed. Each assignment of error was reviewed and upon review the following disposition made:

This is an appeal from a judgment of the Cuyahoga County Common Pleas Court permanently enjoining the City of Cleveland from laying off regularly appointed police officers while temporary appointees remained on the payroll in excess of ninety days.

On December 3, 1980, in an effort to balance general fund expenditures with general fund revenues in 1981, the City of Cleveland issued layoff notices to one hundred and eighty-four (184) general fund employees, effective January 1, 1981. Ninety-four (94) of the employees to be laid off were regular appointees in the Civil Service of the City of Cleveland while ninety (90) of the employees to be laid off were temporary employees in the Civil Service of the City.

On December 3, 1980, appellees, William J. McNea et al., filed an action in behalf of fifty-three police officers for a declaratory judgment and injunctive relief seeking to prohibit the layoff of the fifty-three (53) police officers while the City, appellant herein, maintained hundreds of temporary appointees in employment beyond ninety (90) days from their initial date of their hiring. Appellants' action also sought to enjoin the layoffs of the police officers on the ground such layoffs were excessive and jeopardized the health, safety, and welfare of the citizens of the City of Cleveland. A second amended complaint was filed by appellees after new party defendants were added as class representatives of the temporary appointees on the City's payroll.

On December 31, 1980, the trial court granted a preliminary injunction which was appealed to this court. The appeal was dismissed. After an application for a Writ of Mandamus was filed in this court, the parties agreed to proceed to trial as to appellees' prayer for a permanent injunction.

On January 9, 1981, a Third Amended Complaint was filed by appellees joining the members of the Cleveland Civil Service Commission as party defendants.

On January 15, 1981, the trial court issued a permanent injunction enjoining the City from laying off regularly appointed police officers while temporary appointees remained on the payroll in excess of ninety (90) days. The trial court also held that the layoff of the fifty-three (53) police officers would jeopardize the health, safety, morals, and welfare of the citizens of the City of Cleveland.

The City of Cleveland has appealed the judgment to this court and filed the following five assignments of error:

1. The trial court erred in refusing to dismiss the within action for lack of jurisdiction.

2. The trial court erred in concluding that there is any legal relationship between the layoff of patrol officers for lack of funds and the status of temporary appointees in the classified civil service of the City.

3. The trial court erred in concluding that temporary appointees in the classified civil service of the City who have occupied positions in excess of ninety days and receive compensation from the general fund do so in contravention of Sections 130 and 135 of the Cleveland Charter.

4. The trial court erred in refusing to recognize the renewal of temporary appointments effective December 29, 1980.

5. The trial court erred in enjoining the layoff of fifty-three patrol officers for lack of funds, in the absence of evidence in the record that such layoffs constituted a gross abuse of executive discretion.

Appellants, new party defendants Jeffrey Comfort and Gary J. Neid, also have appealed the judgment and have filed the following three assignments of error:

1. The Court of Common Pleas erred in its determination that some 681 persons holding temporary appointments to positions in the classified service of the City of Cleveland, who have held their present positions for more than ninety days, but have been denied their right to be tested therefore by the Cleveland Civil Service Commission, occupy their offices or positions and are compensated for their work in contravention of the Charter of the City of Cleveland.

2. The Court of Common Pleas erred in its determination that the appointing officers of the City of Cleveland are precluded from effecting the reappointment of persons temporarily to positions within the classified service of the City of Cleveland.

3. The Court of Common Pleas erred in construing liberally the provisions of Section 90 of the Charter of the City of Cleveland in favor of Plaintiffs, and in holding thereby that Plaintiffs were not required to request that the Director of Law of the City of Cleveland commence this action, prior to the institution of the action by the claimed taxpayers.

The assigned errors are without merit.

All appellants contend appellees failed to establish jurisdiction for their action by failing to make a written request of the Director of Law to institute such an action and failed to present evidence that such request would be a vain act.

Section 90 of the Charter of the City of Cleveland, as to an action to enforce a public right to the performance of a public duty by an officer of a municipal corporation, provides:

> "In case the Director of Law, upon written request of any taxpayer of the City, fails to make any application provided for in the preceding three sections, such taxpayer may institute suit or proceedings for such purpose in his own name on behalf of the City. No such suit or proceeding shall be entertained by any court until such request to the Director of Law shall first have been made . . ."

However, the Ohio Supreme Court has held that the prerequisite of written request upon a Law Director is excused where such a request would be a vain, useless, or futile act. Whether such futility exists depends upon the facts surrounding the taxpayer's litigation and the actions or inactions, motives, intent, and statements of the Law Director. *State ex rel. White v. Cleveland* (1973), 34 Ohio St. 2d 37.

The evidence presented by appellees clearly indicates it would have been a vain, useless, and futile act for appellees to have served a written request upon the Law Director of the City of Cleveland prior to filing their taxpayer's action. The Law Director had knowledge of the large number of temporary employees on the City's payroll in excess of ninety (90) days for six months prior to the institution of the action and took no action as to said employees despite having his staff research the legality of their continued employment. Failure to act as to said employees indicates the administration of the City felt their employment was lawful. The Law Director actively participated in the administration's determination to layoff

the fifty-three (53) police officers. The Law Director was also quoted in the Cleveland media as prepared to meet any challenges to the administration's layoff order.

Appellants next contend, in City of Cleveland's assignments of error two, three, and five and in new party defendants' first assignment of error that the trial court erred in finding that there was any legal relationship between the status of temporary appointees of the City of Cleveland over ninety (90) days and the right of the City to layoff City employees and the court erred, in the absence of an abuse of discretion by the Mayor in effecting the layoff program, in enjoining that layoff program.

These contentions of appellants were before this court in *Gannon v. Perk* (1976), 47 Ohio App. 2d 125. In *Gannon*, this court found that the requirements of Article XVIII, Sections 6 and 13 and R.C. 5705.39 and R.C. 5705.40 which require municipal corporations to maintain balanced budgets authorized the Mayor to layoff civil service employees for lack of funds as long as he did so in conformity with law. However, this court found that Section 130 and 135 of the Charter of the City of Cleveland prohibited the City from retaining temporary employees in excess of ninety days unless they became regular appointments by competitive examination and certification and prohibited any payments to them by the City Treasurer.

Although the Ohio Supreme Court dismissed the action for failure to join all temporary employees deprived the trial court of jurisdiction, it did not address this court's construction of Sections 130 and 135 of the Charter.

We reaffirm this court's construction of Sections 130 and 135 of the Cleveland Charter. Accordingly, we conclude the Mayor did not exercise his authority to effect layoffs of Civil Service employees for budgetary reasons

in conformance with the applicable law. Failure to do so constituted an abuse of discretion by the Mayor.

Appellants, in new party defendants' second assignment of error and City of Cleveland's fourth assignment of error, argue that the trial court erred in determining that the appointing officers of the City of Cleveland are precluded from affecting the reappointment of persons temporarily to positions within the classified service of the City of Cleveland.

In letters to the Civil Service Commission dated December 26, 1980, the various department heads of the City of Cleveland purportedly reappointed the temporary employees within their particular departments for an additional ninety days. The Civil Service Commission approved such reappointments at its regularly scheduled meeting of January 5, 1981.

However, the evidence indicates the letters from the various department heads were drafted and issued approximately three weeks after the instant litigation was filed. The evidence also indicates the Mayor did not personally sign any of the reappointment letters although his signature appears as the appointing authority on all the letters. The evidence as to the reappointment letters indicates it was an effort to moot the pending law suit.

We also conclude the purpose of Section 130 is to preserve the merit principle in civil service appointments by prohibiting any temporary employee from holding in excess of ninety days without altering his employment status by competitive examinations.

Therefore, the trial court did not err in declaring the action of reappointing temporary employees illegal and of no effect.

Judgment affirmed.

It is ordered that appellee(s) recover of appellant(s) their costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

/s/ ROBERT E. COOK
Judge
Presiding Judge

STILLMAN, *J.*,
SILBERT, *J.*, concur.

(STILLMAN, *J.*, and SILBERT, *J.*,
Retired of the Eighth Appellate
District, Sitting by Assignment;
COOK, *P.J.*, of the Eleventh
Appellate District, Sitting by
Assignment)

DECISION AND JUDGMENT OF THE OHIO COURT OF COMMON PLEAS

(Dated January 15, 1981)

Case No. 20649

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

WILLIAM J. McNEA, *et al.*,
Plaintiffs,

vs.

GEORGE VOINOVICH, *et al.*,
Defendants.

JUDGMENT ENTRY

This matter came on for hearing this 9th day of January, 1981, upon the merits of the plaintiffs' prayer for permanent injunctive relief by reason of an understanding with the Court of Appeals following the institution of a mandamus proceeding by the defendants in that Court, and upon the pleadings, the evidence, and proceedings had herein, all parties being represented by Counsel.

All other aspects of the within cause will be disposed of at a later date.

The Court finds as follows:

A. That the within cause has proceeded as a class action under Rule 23(B)(3) Ohio Rules of Civil Procedure against the defendant class consisting of all em-

ployees of the City of Cleveland occupying a position within the classified civil service of the City who have never been tested nor certified by the Civil Service Commission of the City for said position but continue to receive a salary as compensation on account of holding said position and have been employed in said position in excess of ninety (90) days.

B. That new party defendants Jeffrey Comfort and Gary J. Neid were designated as the class representatives of the defendant class and have fairly and adequately protected and represented the interests of the class.

C. That the plaintiffs on December 22, 1980, at approximately 4:00 P.M. caused to be delivered to the City of Cleveland Mail Room 1243 envelopes addressed to each City of Cleveland temporary appointee at his or her assigned City Department. Each envelope contained a two page "Notice of Pendency of Class Action" in the form and style attached hereto as Exhibit A.

D. That the list of names and department addresses of temporary appointees utilized by the plaintiffs was provided by the defendant City of Cleveland.

E. That such notification complies with this Court's class notice requirement as set out in its Journal Entry of December 19, 1980, and this Court is satisfied that the defendant class has received notice and has had ample opportunity to appear in these procedings and upon plaintiffs' Motion for Preliminary Injunction, and upon the merits of plaintiffs' prayer for permanent injunctive relief.

F. That the defendant class has retained Malcolm C. Douglas, Esq. as legal counsel who has appeared before the Court in these proceedings on behalf of the defendant class.

G.(1) That presently the City of Cleveland employs approximately 681 temporary employees who without having taken a Civil Service Commission examination or being certified by the Civil Service Commission of the City occupy positions within the classified civil service of the City and who are paid strictly from the General Fund, and not from any special, limited, governmental or self-generating fund.

(2) That these 681 temporary employees have occupied classified civil service positions with the City for a period in excess of 90 days in direct contravention of the City of Cleveland Charter Section 130 and continue to receive payment, salary and/or compensation by virtue of their holding said positions in direct contravention of the City of Cleveland Charter Section 135, and Article XV, Section 10, of the Ohio Constitution.

(3) That these 681 temporary employees continue to occupy their positions within the classified civil service of the City and receive payment, salary and/or compensation, both contrary to law.

H. That 53 Cleveland police officers who are regular certified employees, 52 of whom graduated from the Cleveland Police Academy on December 19, 1980, were scheduled to be laid off due to budgetary considerations on January 1, 1981. These police officers took Civil Service examinations and were certified for the positions that they currently hold.

I. That on December 31, 1980, this Court granted the plaintiffs' Motion for a Preliminary Injunction enjoining the defendants from effecting the layoff of such 53 police officers all certified, regular Civil Service employees.

The Court further finds:

J. (1) That the defendant, City of Cleveland attempted, during the pendency of the within cause, to reappoint in bulk all of its temporary employees. Such actions were conceived by and effected by various members of defendant Voinovich's staff.

(2) That the testimony of defendant Voinovich in the within cause reflected the fact that he neither conceived of nor attempted to effect the reappointment of the temporary employees. The evidence established the fact that defendant Voinovich personally signed none of the documents relating to this attempted reappointment.

(3) The evidence reflects that the Mayor of Cleveland, defendant Voinovich, was not apprised of this attempted subterfuge.

(4) That the attempted evasion by the City of Cleveland of its own Charter provisions through the devious device of reappointing in bulk of all of its temporary employees and thus frustrate the thrust of this litigation was stated on December 31st to be a transparent ploy and a subterfuge not worthy of judicial recognition.

(5) That this Court did not on December 31, 1980, recognize the efficacy of the attempted reappointment of the temporary employees, nor the contended infusion of legal validity to their status. This Court does not at this time recognize such efficacy or validity.

K.(1) That the evidence presented in this proceeding strongly suggests that by reason of lack of manpower the Cleveland Police Department is on the brink of functional paralysis.

(2) That the evidence overwhelmingly establishes the present inability of the Cleveland Police Department to ful-

fill the responsibilities with which it is charged and which it once so admirably performed and that the proposed layoffs of police personnel would jeopardize the health, safety, morals and welfare of the City, the residents and taxpayers thereof.

L. That this Court does not presume to instruct the City of Cleveland with respect to the means by which, or the areas within which the required economies are to be effected.

M. That having met their burden in this proceeding, the plaintiffs' prayer for permanent injunction is granted.

N. That there being no just reason for delay, final judgment with respect to the injunctive relief sought is hereby granted pursuant to Rule 54.

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED:

1. The defendants, their officers, agents and employees are hereby permanently enjoined and restricted from effecting the layoff of any Cleveland Police Officer so long as the defendant City of Cleveland retains and maintains on the City payroll, temporary employees regardless of their Civil Service classification, status, or rank of employment.

2. That Bond in the amount of $10,000.00 previously ordered posted by the plaintiffs is hereby discharged.

IT IS SO ORDERED.

/s/ JAMES J. CARROLL
Judge

ORDER AND JUDGMENT ENTRY OF THE OHIO SUPREME COURT DENYING REHEARING

(Dated June 23, 1982)

No. 81-1108

THE SUPREME COURT OF THE STATE OF OHIO
THE STATE OF OHIO, CITY OF COLUMBUS

WILLIAM J. McNEA *et al.*,
Appellees,

vs.

GEORGE VOINOVICH *et al.*,
Appellants.

REHEARING

It is ordered by the court that rehearing in this case is denied.

THE CHARTER OF THE CITY OF CLEVELAND

§ 130 Eligible Lists; Temporary Appointments.

Eligible lists created by the Commission shall remain in force not longer than two years. In the absence of an appropriate eligible list, any place may be filled temporarily, without test, for the period limited by the civil service rules, but not exceeding ninety days. During such period the Commission shall hold the necessary tests for filling any such place permanently. With the consent of the Commission, persons may be temporarily employed for transitory work without test, but no such employment shall continue for more than sixty days, or be renewed. (Effective November 9, 1931.)

§ 131 Appointments.

When any position in the classified service, except the ordinary unskilled labor class, is to be filled, the appointing authority shall notify the Commission of the fact and the Commission shall certify to such authority the names and addresses of the three candidates standing highest on the eligible list for the class or grade to which such position belongs. The appointing authority shall appoint to such position one of the three persons whose names are so certified. When the eligible list contains less than three names, such names shall be certified, from which the appointing authority may appoint one for such position, except that when the position is promotional the appointing authority shall appoint one for such position. A person certified from the eligible list more than three times to the same or similar position may be omitted from future certification, but certification for a temporary appointment shall not be counted as one of such certifications.

* * * * *

§ 133 Promotions Wherever Practicable.

Wherever practicable, vacancies shall be filled by promotion. Any advancement in rank or increase in salary beyond the limits fixed for the grade shall constitute a promotion. Lists shall be created and promotions made therefrom of candidates in the same manner as in original appointments; provided, however, that less than three shall constitute an eligible list, and the appointing authority shall appoint from the eligible list. (Effective November 8, 1938.)

§ 135 List of Persons in Classified Service.

The Civil Service Commission shall maintain a list of all persons in the classified service, showing in connection with each name the position held, the date and character of each appointment and every subsequent change in status. Each appointing officer shall promptly transmit to the Commission all information required for the establishment and maintenance of such list. The Treasurer shall not pay, nor shall the Commissioner of Accounts issue a voucher for the payment of, any salary or compensation to any person holding a position in the classified service unless the payroll or account of such salary or compensation shall bear the certificate of the Civil Service Commission that the persons named therein have been appointed or employed and are performing service in accordance with the civil service provisions of this Charter and the rules established thereunder. Any sums paid contrary to the provisions of this section may be recovered from any officer paying or authorizing the payment thereof and from the surety on his official bond. (Effective November 9, 1931.)

CLEVELAND CIVIL SERVICE COMMISSION RULES

6.20. Certification of Eligibles. No person shall be considered from an eligible list more than four (4) times by the same appointing authority, for a position of the same or similar classification, except at the request of the appointing authority, provided, however, that no such person shall be certified when to do so operates to prejudice the rights of other eligibles ranking higher on the eligible list.

An eligible whose job classification is city wide shall be certified to other appointing authorities for consideration.

Certification for temporary appointment shall not be counted as one of the four certifications allowed to each eligible.

Whenever one or more eligibles who have been certified waive certification or fail to respond to notice of certification, the certification on which their names appear shall be supplemented by an equal number of additional names. No request for certification of eligibles or additional names to supplement existing certifications shall be honored by the commission after the expiration of such eligible list.

6.30. Notice of Certification. Each eligible, whose name is included in a certification of eligibles, shall be notified in writing by the commission to report "to the appointing authority or his designated officer," within four (4) days for interview. Such notice shall be sent by mail to the last address of the eligible as shown by the records of the commission. Any eligible may waive certification either before being certified or within four

(4) days after being certified except that an eligible may not waive certification more than two (2) times, and the reason for such waiver of certification must be approved by the commission. A waiver of certification shall remain in effect until withdrawn but no waiver shall be permitted for a period longer than six (6) months after which time, if the waiver is not withdrawn, the name of such person shall be removed from the eligible list. An eligible shall not be entitled to certification while his waiver of certification is in effect. The appointing officer shall make immediate report to the commission whether each of the persons certified appeared for an interview and whether any of them declined or waived appointment.

6.40. Request Signed by Appointing Officer. No request for certification of eligibles and no notice of appointment whether of a permanent or temporary appointment, shall be recognized by the commission unless made by and over the signature of the lawful appointing authority.

6.50. Character of Appointments. In accordance with Sections 128, 131 and 133 of the Charter, all appointments to positions in the classified service of the City of Cleveland shall be deemed to be either regular or temporary in character.

Regular appointments shall be either original or promotional. An original appointment shall be any appointment made from an eligible list created as a result of an open competitive or non-competitive test or as a result of an examination for a labor class position. An appointment shall be deemed to be promotional when made from any promotional eligible list and involving an advancement in rank or an increase in salary, or both.

Temporary appointments shall include appointments made, without test, in the absence of an eligible list, ap-

pointments occasioned by emergencies and limited to thirty days duration and appointments for transitory work not exceeding sixty (60) days and not renewable.

6.60. Regular Appointments. Regular appointments shall be made in the manner provided in Sections 131 and 133 of the Charter; however, an appointment made as a result of certification from a list designated by the commission as the most nearly appropriate list shall be deemed to be a regular appointment to the position for which such certification is made.

All regular appointments shall be accomplished within ten (10) days following the date on which certification is executed by the commission; such period may be extended by the commission for good cause shown. However, when it is necessary to supplement a certification by adding names, to replace eligibles who have failed to respond to notice of certification, who have waived certification, or who have declined appointment, another ten (10) day period may be granted to the appointing authority for him to have under consideration the required number of eligibles interested in securing appointment as provided in Sections 131 and 133 of the Charter.

Failure to make appointments as provided herein, shall have the effect of automatically cancelling the certification, and shall be sufficient cause for disapproving the names of any temporary appointees employed in the classification and in the division for which such certification was made.

6.70. Temporary Appointments. In all temporary appointments and notices to the commission thereof, each appointing authority shall carefully designate which of the three following classes of temporary appointments is being made and the nature of the work to be performed thereunder:

A. Pending Establishment of Eligible List:

In the absence of an appropriate eligible list, any place in the classified service may be filled temporarily, without test, but no such temporary appointment shall continue after the establishment of a suitable eligible list; provided, however, that the commission reserves the right to review the qualifications of any such temporary appointee and order the rejection of such temporary appointee if he is found lacking in qualifications.

B. Transitory:

With the consent of the commission, persons may be temporarily employed for transitory work whenever an appointing authority requires temporary assistance because of a special project or temporary increase in the work load, due to seasonal requirements or otherwise. In making such transitory appointments, the appointing authority shall first employ persons, in the appropriate classification based on seniority, who are then on lay-off in that classification, or, if no lay-off list exists, then from an appropriate existing eligible list for such classification, before employing a person not on lay-off or an existing eligible list, but no such employment shall continue for more than sixty (60) days or be renewed.

C. Emergency:

When an emergency arises, such that in order to prevent the loss of public property, serious inconvenience to the public, or damaging delay to the public service, and one or more persons must be employed without the delay incident to regular certification and appointment, an appointing authority

may, without consulting the commission, appoint a qualified person or persons during the period of emergency, but in no such case for a period exceeding thirty (30) days. Emergency appointments, with the reasons therefor, shall be immediately reported to the commission which reserves the right to inquire into the nature of the emergency and to reject such appointment if it is found not to be an emergency, and in no case shall successive appointments follow directly upon one another without the express approval of the commission.

6.75. The Temporary Appointee. The temporary appointee has those rights and privileges of a regular appointee which are in conformity with the provisions of the City Charter and the Rules of the Civil Service Commission subject to the exceptions listed below:

The Temporary Appointee:

1. Must have the previously established minimum qualifications required for the specific classification.
2. Receives no seniority credit which only commences from the effective date of regular appointment.
3. Is not eligible to transfer to another position.
4. Is not eligible to take promotional examinations.
5. Does not serve a probationary period.
6. Has no restorative rights to an eligible list should he resign.
7. Is not placed on an eligible list during lay-off.

The temporary employee is subject to the same disciplinary action as the regular appointee.

OHIO RULES OF APPELLATE PROCEDURE

Rule 9

THE RECORD ON APPEAL

(A) Composition of the record on appeal. The original papers and exhibits thereto filed in the trial court, the transcript of proceedings, if any, including exhibits, and a certified copy of the docket and journal entries prepared by the clerk of the trial court shall constitute the record on appeal in all cases. A videotape recording of the proceedings constitutes the transcript of proceedings other than hereinafter provided, and, for purposes of filing, need not be transcribed into written form. Proceedings recorded by means other than videotape must be transcribed into written form. When the written form is certified by the reporter in accordance with App.R. 9(B), shall constitute the transcript of proceedings. When the transcript of proceedings is in the videotape medium, counsel shall type or print those portions of such transcript necessary for the court to determine the questions presented and append such copy of the portions of the transcripts to their briefs.

In all capital cases the trial proceedings shall include a written transcript of the record made during the trial by stenographic means.

(B) The transcript of proceedings; duty of appellant to order; notice to appellee if partial transcript is ordered. At the time of filing the notice of appeal the appellant shall in writing order from the reporter a complete transcript or a transcript of such parts of the proceedings not already on file as he deems necessary for inclusion in the record and shall file a copy of said

order with the clerk. The reporter is the person appointed by the court to transcribe the proceedings for the trial court whether by stenographic, phonogramic or photographic means, or by the use of audio electronic recording devices, or by the use of video recording systems. If there be no officially appointed reporter, Rule 9(C) or 9(D) may be utilized. If the appellant intends to urge on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the weight of the evidence, he shall include in the record a transcript of all evidence relevant to such findings or conclusion. Unless the entire transcript is to be included, or if no transcript is necessary, or if a statement pursuant to either Rule 9(C) or 9(D) is to be prepared in lieu of a transcript, the appellant shall, with his notice of appeal, file with the clerk of the trial court and serve on the appellee a description of the parts of the transcript which he intends to include in the record or a statement that no transcript is necessary or that a statement pursuant to either Rule 9(C) or 9(D) will be submitted, and a statement of the assignments of error he intends to present on the appeal. If the appellee deems a transcript of other parts of the proceedings to be necessary he shall, within ten days after the service of the statement of the appellant, file and serve on the appellant a designation of additional parts to be included. The clerk of the trial court shall forward a copy of this designation to the clerk of the court of appeals.

If the appellant shall refuse, or fail within ten days after service upon him of appellee's designation, to order such parts, the appellee within five days thereafter, shall either order the part in writing from the reporter or apply to the court of appeals for an order requiring the appellant to do so. At the time of ordering, a party shall arrange for the payment to the reporter of the cost of the transcript.

The reporter shall certify the transcript as correct whether in written or videotape form and state whether it is a complete or partial transcript, and, if partial, indicate the parts included and the parts excluded.

If the proceedings were recorded in part by videotape and in part by other media, the appellant shall order the respective parts from the proper reporter and the record is complete for the purposes of appeal when the last such part is filed with the clerk of the trial court.

OHIO REVISED CODE

2505.21 Hearing on appeal

Appeals taken on questions of law shall be heard upon assignments of error filed in the cause or set out in the briefs of the appellant before hearing. Errors not specifically pointed out in the record and separately argued by brief may be disregarded, but the court may consider and decide errors which are not assigned or specified. Failure to file such briefs and assignments of error within the time prescribed by the court rules is cause for dismissal of such appeal. All errors assigned and briefed shall be passed upon by the court. In its decision the reviewing court shall specify such of the assigned errors as it finds are shown by the record and the reasons for its decision. In every case where a judgment or order is reversed and remanded for a new trial or hearing, in its mandate to the court below, the reviewing court shall state the errors found in the record upon which the judgment of reversal is founded.

An appeal taken on questions of law and fact entitles the party to a hearing and determination of the facts de novo which shall be upon the same or amended pleadings. The court shall review the final order, judgment or decree upon such part of the record made in the trial court as any party may present to the court and such additional evidence as upon application in the interest of justice the court may authorize to be taken, such evidence to be presented in the manner and form prescribed by the court.

PETITIONERS' THIRD AMENDED COMPLAINT SEEKING DECLARATORY RELIEF, TEMPORARY RESTRAINING ORDER, AND PRELIMINARY AND PERMANENT INJUNCTION

(Filed January 6, 1981)

Case No. 20649

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

WILLIAM J. McNEA, Taxpayer and as President of the Cleveland Police Patrolmens Association,

and

PAUL JURCISIN, Taxpayer,

and

CLEVELAND POLICE PATROLMENS' ASSOCIATION, As and on behalf of its members,
Plaintiffs.

v.

GEORGE VOINOVICH, Mayor, City of Cleveland, THOMAS WAGNER, Law Director, City of Cleveland, JACK CROSS, Treasurer, City of Cleveland, WILLARD LARGENT, Safety Director, City of Cleveland, CITY OF CLEVELAND, VINCENT AMATO, Acting Safety Director, City of Cleveland,

and

JAMES CONRAD, Personnel Director, City of Cleveland, WILLIAM J. BROWN, Attorney General, State of Ohio,
Defendants,

and

JEFFREY COMFORT, GARY J. REID, and JOHN GIEB,
New Party Defendants,

and

ALAN SCHNEIDER, Commissioner of Accounts, City of Cleveland,

and

CLEVELAND CIVIL SERVICE COMMISSION,

and

THOMAS R. SKULINA, President Civil Service Commissioner,

and

MARY R. BUBNA, Vice President Civil Service Commission,

and

EDWARD H. MASON, Secretary Civil Service Commission,

and

P. L. FENDERSON, Civil Service Commission,

and

EDMUND J. TURK, Civil Service Commission,
Additional New Party Defendants.

THIRD AMENDED COMPLAINT SEEKING DECLARATORY RELIEF, TEMPORARY RESTRAINING ORDER, AND PRELIMINARY AND PERMANENT INJUNCTION

PARTIES

1. Plaintiffs are residents and taxpayers of the City of Cleveland. Plaintiffs McNea and Jurcisin are officers and members of the Cleveland Police Patrolmen's Association (hereinafter C.P.P.A.) and are sworn classified employees of the City of Cleveland, Department of Public Safety, Division of Police, holding the rank of patrolman.

2. Plaintiff, the C.P.P.A., is recognized by the City of Cleveland as the sole exclusive collective bargaining agent on behalf of the bargaining unit made up of all of the Cleveland Police Department Patrol Officers for the purpose of bargaining with respect to wages, hours and other conditions of employment and brings this action on its behalf and on behalf of all of its members.

3. Defendant George Voinovich (hereinafter "Voinovich") is the Mayor of the City of Cleveland.

4. Defendant Thomas Wagner (hereinafter "Wagner") is the Law Director of the City of Cleveland.

5. Defendant Jack Cross (hereinafter "Cross") is the Treasurer of the City of Cleveland.

6. Defendant Willard Largent (hereinafter "Largent") is the Safety Director of the City of Cleveland.

7. Defendant Vincent Amato (hereinafter "Amato") is the Acting Safety Director of the City of Cleveland.

8. Defendant City of Cleveland (hereinafter "City") is a municipal corporation operating pursuant to Charter.

9. Defendant James Conrad (hereinafter "Conrad") is the Personnel Director of the City of Cleveland.

10. Defendant William J. Brown (hereinafter "Brown") is the Attorney General of the State of Ohio and is named herein as a party defendant pursuant to Ohio Revised Code Section 2721.12.

11. New Party defendant Jeffrey Comfort (hereinafter "Comfort") is Commissioner of the Department of Health of the City of Cleveland. New party defendant Gary N. Neid (hereinafter "Neid") is the Commissioner of the Department of Air Pollution Control of the City of Cleveland. New party defendant John Gieb (hereinafter

"Gieb") is the Deputy Commissioner of Airports of the City of Cleveland.

12. New party defendants Comfort, Neid and Gieb are employees of the City and occupy the aforementioned positions within the classified civil service of the City. Comfort, Neid and Gieb have not taken civil service examinations for their respective positions and, therefore, have never been certified by the Civil Service Commission of the City for their positions. Comfort, Neid and Gieb have each held their present positions for a period in excess of ninety (90) days and although they have never been tested nor certified continue to receive salary and compensation by virtue of their holding said positions.

13. Defendants Comfort, Neid and Gieb are joined herein as party defendants and class representatives of a class comprised of employees of the City of Cleveland who are similarly situated, to wit: all employees occupying a position within the classified civil service of the City of Cleveland, who have never been tested for said position and have never been certified by the Civil Service Commission of the City for said position but continue to receive a salary or compensation on account of holding said position even though he has been employed in said position for a period in excess of ninety (90) days.

14. Defendants Comfort, Neid and Gieb are joined as party defendants and class representatives on behalf of all members of the class designated above, for the reason that:

(a) The class is so numerous that joinder of all members is impracticable;

(b) there are questions of law or fact common to the class;

(c) the defenses of the representative parties are typical of the defenses of the class;

(d) the representative parties will fairly and adequately protect the interests of the class.

15. Additional new party defendant Alan Schneider is the Commissioner of Accounts for the City of Cleveland.

16. Additional new party defendant The Cleveland Civil Service Commission is charged pursuant to the Charter of the City of Cleveland with administering the City's Civil Service system and certifies the various employment and certification procedures of the City's employees. The Commission is comprised of and acts through its five members. The members pass resolutions both in private executive session and at open public meetings. Such actions are reflected in its Minutes.

17. Additional new party defendant Thomas R. Skulina is the duly appointed President and presently a member of the Cleveland Civil Service Commission.

18. Additional new party defendant Mary R. Bubna, is the duly appointed Vice President and presently a member of the Cleveland Civil Service Commission.

19. Additional new party defendant Edward H. Mason, is the duly appointed Secretary and presently a member of the Cleveland Civil Service Commission.

20. Additional new party defendant P.L. Fenderson is presently a member of the Cleveland Civil Service Commission.

21. Additional new party defendant Edmund J. Turk is presently a member of the Cleveland Civil Service Commission.

22. Plaintiffs bring this action in their respective capacities as residents and taxpayers of the City and as Officers of the C.P.P.A. and sworn classified employees of the City of Cleveland, Department of Public Safety,

Divison of Police, holding the rank of patrolman. On December 2, 1980, a demand to bring the within action was made upon Thomas Wagner, Law Director of the City of Cleveland (Exhibit A), by United States Mail. However, based upon the public statements of the defendants and their conduct on December 2, 1980, wherein they told Plaintiff McNea and other City Union leaders of layoffs scheduled for January 1, 1981, it is apparent that future demand by taxpayers is vain and futile.

COUNT I

23. On or about December 2, 1980, Voinovich publicly announced that approximately 53 Police Officers of the City of Cleveland who are regular appointees would be laid off, effective January 1, 1981, and that layoff notices would be forthcoming.

24. These layoff notices will advise that the actual layoffs will become effective and will be implemented on January 1, 1981.

25. The 53 Police Officers proposed for layoff are regular, qualified and duly appointed employees of the City occupying positions within the classified civil service of the City and assigned to the Cleveland Police Academy. These Police Officers took civil service examinations for the positions that they currently hold and were certified by the Civil Service Commission of the City for the positions they presently occupy.

26. Plaintiffs believe and, therefore, state that the defendants will be laying off additional regular classified appointed Police Officers in the near future.

27. Presently, the City employs more than Eleven Hundred (1100) temporary employees, who without having taken a Civil Service Commission examination or being

certified by the Civil Service Commission of the City, occupy positions within the classified civil service of the City. Those approximately 1100 temporary employees have occupied classified civil service positions of the City for a period in excess of 90 days in contravention of the City Charter Section 130 and continue to receive payment, salary and compensation by virtue of their holding said positions in contravention of City Charter Section 135.

28. City Charter Section 130 provides:

"Eligible lists created by the commission shall remain in force not longer than two years. In the absence of an appropriate eligible list, any place may be filled temporarily, without test, for the period limited by the civil service rules, but not exceeding ninety days. During such period the commission shall hold the necesary tests for filling any such place permanently. With the consent of the commission, persons may be temporarily employed for transitory work without test, but no such employment shall continue for more than sixty days, or be renewed."

29. City Charter Section 135 provides in pertinent part:

"The treasurer shall not pay, nor shall the commissioner of accounts issue a voucher for the payment of any salary or compensation to any person holding a position in the classified civil service unless the payroll or account of such salary or compensation shall bear the certificate of the civil service commission that the persons named therein have been appointed or employed and are performing service in accordance with the rules established thereunder. Any sums paid contrary to the provisions of this section may be recovered from any officer paying or authorizing the payment thereof and from the surety on his official bond."

30. The approximately 1100 temporary employees presently on the payroll of the City are employed and being paid in contravention of the Charter of the City.

31. No regular, qualified or duly appointed civil service employees of the City may be laid off until all temporary employees who have been on the City payroll in excess of 90 days have been laid off.

COUNT II

32. Plaintiffs reallege as if fully restated herein all allegations contained in the preceding paragraphs 1 through 31 hereof, inclusive, and further state:

33. City Charter Section 71 provides in pertinent part:

> "It shall be the duty of the mayor to act as chief conservator of the peace within the City . . ."

34. City Charter Section 115 provides:

> "The City shall maintain a police force and fire force, and the mayor shall be the executive head of both forces. If these forces are or shall be placed in a department in accordance with the provisions of Section 77 of this Charter the director of this department shall be their executive head under the direction of the mayor."

35. The layoff of approximately 53 Police Officers, the impending future layoffs, taken together with 102 Police Officers who retired during 1980 and the probable retirement of 213 Police Officers during 1981, will reduce the complement of the Cleveland Police Department to dangerously low proportions such that the manpower and the very strength of the Police Department essential services heretofore performed by the Police Department will

be curtailed all to the detriment of the residents and taxpayers of the City.

36. The layoff of approximately 53 Police Officers is excessive and will jeopardize the health, safety, morals and welfare of the City and the residents and taxpayers thereof.

37. Voinovich, Largent, Amato and other defendants in ordering and instituting the layoff of 53 Police Officers and the impending layoffs which will jeopardize the health, safety, morals and welfare of the residents and taxpayers of the City have grossly abused their discretion and Voinovich has specifically violated his aforesaid Charter responsibilities.

COUNT III

38. Plaintiffs reallege as if fully rewritten herein all of the allegations contained in the preceding paragraphs 1 through 37 inclusive, and further state that Article XV, Section 10 of the Ohio Constitution provides:

"XV §10 Civil Service

> Appointments and promotions in the civil service of the state, and several counties, and cities, shall be made according to merit and fitness, to be ascertained, as far as practicable, by competitive examinations. Laws shall be passed providing for the enforcement of this provision."

39. The impending layoffs of regular appointees to the Cleveland Police Department in advance of temporary appointees to the same job classification violates Article XV, Section 10 of the Ohio Constitution.

COUNT IV

40. Plaintiffs reallege as if fully rewritten herein all of the allegations contained in the preceding paragraphs 1 through 39 inclusive, and further state that the defendant City of Cleveland and its named defendant officials have attempted and will continue to attempt during the pendency of this litigation, to cause the defendant Civil Service Commission by and through the defendant Civil Service Commission members, to reappoint or otherwise terminate and immediately rehire as new temporary employees through the guise of official City and Civil Service actions, all members of the defendant class thereby defeating the claims of the plaintiffs and the taxpayers they represent. That between December 17 and December 29, 1980, defendant City of Cleveland and its named defendant officials caused each City Department Head to forward letters to the Cleveland Civil Service Commission ostensibly for the purpose of reappointing all members of the defendant class which members worked within the respective departments. That at the January 5, 1981, meeting of the Civil Service Commission such Commission accepted such reappointments en masse and thereby lent its official approval to such reappointment of each member of the defendant class.

41. That such attempted reappointments of all the members of the defendant class is an attempt to circumvent the clear requirements of the City Charter and constitutes a flagrant abuse of authority and discretion by the defendant City of Cleveland, its named defendant officials, the Cleveland Civil Service Commission, and its named defendant members for which plaintiffs have no adequate remedy at law.

42. That this Court should declare that such actions taken by the respective defendants to defeat the provisions

of the City Charter are illegal, null and of no effect, and thereby permanently enjoin such reappointments.

WHEREFORE, plaintiffs demand:

1. That defendants be enjoined from laying off any Cleveland Police Officers until all temporary employees of the City of Cleveland who have occupied classified civil service positions for a period in excess of 90 days without having taken a civil service examination and having been certified for the position are laid off.

2. That defendants be enjoined from laying off any Cleveland Police Officers as the same will jeopardize the safety, health, morals and welfare of the residents and taxpayers of the City of Cleveland.

3. That defendants be enjoined from paying or issuing vouchers for the payment of any salary or compensation or emolument of any fund to any person holding a position in the classified civil service contrary to the Charter of the City of Cleveland, and particularly all temporary employees on the payroll of the City for a period in excess of 90 days without having passed a civil service examination notwithstanding any attempted reappointment by the City of Cleveland.

4. That defendants Voinovich, Wagner, Cross, Largent, Amato, Conrad and Schneider be ordered personally to reimburse the City of Cleveland all funds paid to the temporary employees of the City who have been on the City payroll in excess of 90 days without first having passed a civil service examination.

5. That the actions of the defendant City of Cleveland and its named defendant officials and those of the Cleveland Civil Service Commission in attempting to reappoint all members of the defendant class be declared illegal, void and of no effect.

6. That the defendant City of Cleveland and its named defendant officials, and the defendant Civil Service Commission and its members be permanently enjoined from reappointing for like 90 days periods of employment the members of the defendant class.

7. That costs of this proceeding be assessed against the defendants and that the plaintiffs, as taxpayers, be awarded a reasonable sum as and for attorneys fees and that the same be taxed as part of the costs.

8. For such other and further relief as the Court deems appropriate.

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Cleveland, Ohio 44114
687-0900
Attorneys for Plaintiffs

EXCERPT FROM CITY RESPONDENTS' BRIEF ON THE MERITS TO THE OHIO SUPREME COURT

Case No. 81-1108

IN THE SUPREME COURT OF OHIO

WILLIAM J. McNEA, *et al.*,
Plaintiffs-Appellees,

vs.

GEORGE VOINOVICH, *et al.*,
Defendants-Appellants,

and

JEFFREY COMFORT and GARY J. NIED,
New Party Defendants-Appellants.

DEFENDANTS-APPELLANTS' BRIEF

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ARGUMENT

At the trial of the instant action, plaintiffs failed to adduce any evidence in support of Count III of their complaint—that patrol officers were to have been laid off "in advance of temporary appointees in the same job classification." Since Rule 8.20 of the Civil Service Commission requires appointing authorities to lay off employees in any classification in inverse order of their appointments to that classification, the allegations of Count III, if proven, would have been a valid ground for enjoining the proposed patrol officer layoffs. However, neither the trial court nor the Court of Appeals rested their decisions on this ground.

With respect to the second count of plaintiffs' complaint—that the layoff of 53 of some 1,850 patrol officers was so excessive as to constitute an abuse of discretion on the part of the Mayor, the trial court made a finding in plaintiffs' favor. On appeal to the Court of Appeals, the City of Cleveland assigned this finding as error, on the ground that plaintiffs had failed to sustain the heavy burden of proof required to invalidate the discretionary acts of executive officers. The Court of Appeals failed to address this burden-of-proof question in its Journal Entry and Opinion. Nevertheless, since such a determination must be made on a case-by-case basis, and since the proposed layoffs of police officers at issue in the courts below were supsequently rescinded, the *City of Cleveland will forego raising this issue in this appeal.* (Emphasis added.)

The purpose of this appeal then, is to determine whether the courts below were correct in granting plaintiffs relief under the first count of their complaint. In that count, plaintiffs alleged at paragraph 24 of their complaint that "(n)o regular, qualified or duly appointed civil service employee of the City may be laid off until all temporary employees who have been on the City payroll in excess of 90 days have been *laid off.*" (Emphasis added.) Thus, plaintiffs sought to have the court establish a city-wide "regulars over temporaries" layoff priority. Such a result would divorce layoffs from their financial underpinnings: lack of divisional appropriations for personal services sufficient to compensate the existing divisional work force. (Emphasis added.)

• • • • •